Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK GRANT, JR., EVELYN H. GRANT, and all other persons similarly situated,

Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

THOMAS W. TUCKER
Counsel of Record
DYE, MILLER, TUCKER & EVERITT
Post Office Box 2426
Augusta, Georgia 30903
(404) 722-0771

JOHN BELL TOWILL
DAVID E. HUDSON
HULL, TOWELL, NORMAN & BARRETT
Post Office Box 1564 (13)
Augusta, Georgia 30913
(404) 722-4481

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 GA RR Bank Bldg.
Augusta, Georgia 30901
(404) 722-7541

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

I. THE PURPORTED INTERPRETATION OF THE FEDERAL HOME LOAN BANK BOARD HAS BEEN TOTALLY DISCREDITED AND IS NOT ENTITLED TO DEFERENCE. 1

II. THE ISSUE OF FEDERAL LAW IS IMPORTANT AND IS ONE THAT SHOULD BE DECIDED BY THIS COURT .. 5

III. THE CLAIMS OF PETITIONERS HAVE NOT BEEN AFFECTED BY LEGISLATION ENACTED IN GEORGIA SUBSEQUENT TO THE FILING OF THIS ACTION 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

American National Bank & Trust Co. v. Haroco Inc., 87 L.Ed2d 437 (1985) 6

Ewell v. Daggs, 108 U.S. 143 (1883) 8

Ford Motor Credit Co. v. Milhollin, 444 U. S. 555 (1980) 1, 4

Fountain v. Dixie Finance Corp., 252 Ga. 543, 314 SE2d 906 (1984) 8

Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037 (8th Cir. 1984) 3

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 9, 10

Richardson v. C.I.T. Corp., 60 Ga. App. 780,5 SE2d 250 (1939) 7

Rigdon v. Walker Sales & Service, Inc., 161 Ga. App. 459, 288 SE2d 711 (1982) 7

Securities Industry Association v. Board of Governors of the Federal Reserve System,82 L.Ed.2d 107 (1984) 3, 4

Sumner v. Adel Banking Co., 244 Ga. 73, 259 SE2d 32 (1979) 7

E. Tris Napier Co. v. Trawick, 164 Ga. 781, 139 S.E. 552 (1927) 7

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 10

United States Trust Co. of New York v. State of New Jersey, 431 U.S. 1 (1977) 8, 9

Ward v. Hudco Loan Co.., 254 Ga. 294, 328 SE2d 729 (1985) 8

CONSTITUTION

Art. 1, Sec. 10, Clause 1, United States Constitution . 9

STATUTES

Depository Institution Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, Title V, § 501, 94 Stat. 161 (Preemption Act) ..... *passim*

15 U.S.C.A. § 1640(f) 4

OCGA § 7-4-3 8

Table of Authorities Continued

	Page
OCGA § 7-4-3(b)(1)	8
OCGA § 7-4-5(b)	8
OCGA § 10-1-33(b)	9
OCGA § 10-1-36.1(b)	9
F.R.C.P. 12(b)(6)	6
LEGISLATIVE HISTORY	
H. Conf. Rept. 96-842, 96th Cong., 2nd Sess. 79, reprinted in 1980 *U. S. Code Cong. & Ad. News*, 298	5, 6
REGULATIONS	
45 Fed. Reg. 31122 (May 12, 1980)	2
45 Fed. Reg. 43681 (June 30, 1980)	2
12 CFR § 500.17	3
12 CFR § 590.5	3
OTHER REFERENCES	
February 21, 1980 testimony of the Coordinating Council on Mobile Homes Financing before the House Banking, Finance and Urban Affairs Committee at pp. 24-25	7
Federal Home Loan Bank Board amicus curiae brief before the Eleventh Circuit Court of Appeals at p. 3	2
1985 Statistical Abstract of the United States, 105th Ed., U. S. Dept. of Comm., Bureau of the Census, No. 1329	6
National Automobile Dealers Association Mobile Home Manufactured Housing Appraisal Guide, Sept,-Dec.Ed., 1985	6
Wall Street Journal, February 23, 1982, at 52, Col. 4	6
The Columbus Enquirer, Nov. 7, 1985, p. B-1	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-584

JACK GRANT, JR., EVELYN H. GRANT,
and all other persons similarly situated,

Petitioners,

VS.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

REPLY BRIEF OF PETITIONERS

I.

The Purported Interpretation Of The Federal Home Loan Bank Board Has Been Totally Discredited And Is Not Entitled To Deference.

In support of its argument that there is no need for a finance company to include in its contract a provisions concerning a 30-day notice of right to cure, respondent relies on an October 28, 1982 opinion of the Office of the General Counsel of the Federal Home Loan Bank Board (Bank Board) which it argues is entitled to deference under *Milhollin*. At first blush, GECC's

position might appear to have substance.[1] However, GECC has failed to inform this Court of the circumstances surrounding the production of that letter. The letter was specifically solicited by GECC after it had lost a preemption case in Arkansas. (See Appendix A to this Reply). Additionally, the letter is not an official interpretation of the Bank Board but is merely an unofficial opinion of the Office of General Counsel as is clearly shown by Appendix B to this Reply in which the Bank Board stated that it had not "issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221."

The General Counsel's opinion letter relied upon by GECC and which it claims is entitled to deference is also in direct conflict with official positions taken by the Bank Board. In proposing the regulations ultimately promulgated, the Bank Board opined as follows:

> [S]tate usury ceilings may be exceeded by a lender covered by this Act *only if the loan complies with such regulations.*

45 Fed. Reg. 31122 (May 12, 1980) (Emphasis added).

> *The rules prescribe consumer protections which must be included in loans* secured by first lien on mobile homes before such loans are eligible for the state usury law exemption . . .

45 Fed. Reg. 43681 (June 30, 1980) (Emphasis added). In an *amicus curiae* brief filed with the Eleventh Circuit Court of Appeals, the Bank Board stated that:

> Under the Act, state usury limits on loans secured by first liens on residential manufactured homes are preempted

---

[1]Perhaps because it did not obtain other opinions from Bank Board counsel to use in defense, GECC offers no response to justify the other defects in its form contract which disqualify it for preemption. These defects are fully discussed in the Petition and will not be set forth again.

> *as long as the loans are made in conformance with the Board's consumer protection regulations* with respect to, *inter alia*, prepayment penalties and *foreclosure notices*, both of which are at issue herein.

Bank Board *amicus curiae* brief before the panel at p. 3. (Emphasis added).

When the October 28, 1982 letter is considered for what it truly is, it should receive no more deference than the argument of any other advocate in this case. It is erroneous for GECC to characterize its solicited opinion as that of the Bank Board itself. The opinion plainly shows that it is the product of the office of general counsel. For example, the October 28, 1982 letter concludes by pointing out that it contains the "view of this office." Indeed, it could not have been anything else as the Bank Board has acknowledged as noted above that there has been no delegation of authority to the office of general counsel to issue interpretations of the Preemption Act or the regulations. Nor do the Bank Board regulations concerning general counsel authorize that office to issue such interpretations. 12 CFR § 500.17. Interpretations by the Bank Board, on the other hand, are those which are given in response to requests to the Secretary of the Board, and are published in the Federal Register. 12 CFR § 590.5.

It is recognized that informal letters or opinions of agency staff members are not binding and are not to be relied upon by the regulated industry. *Hulshizer v. Global Credit Services, Inc.*, 728 F.2d 1037, 1038 (8th Cir. 1984). Moreover, this Court recently dealt with the question of deference to an agency in general, and especially to opinions of agency attorneys in the case of *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. ____, 82 L.Ed.2d 107 (1984). This case raised the question of what deference should be given to interpretations of the Glass-Steagall Act by the Federal Reserve Board. Especially pertinent to the present appeal and the attempt by the lenders to elevate the opinions of agency attorneys is the following:

> We also have made clear, however, that deference is not to be a device that emasculates the significance of judicial review. *Judicial deference to an agency's interpretation of a statute 'only sets the framework for judicial analysis; it does not displace it.'* (cits.) *A reviewing court 'must reject administrative constructions* of [a] statute, whether reached by adjudication or rulemaking, *that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'* (cits.)

82 L.Ed. at 113. (Emphasis supplied). Thus, in any other context than TILA, even where the agency interpretation is the product of an open process of adjudication or rule making, courts are not to accept agency opinions that are contrary to statute. This Court went on to point out that even less consideration is given to determinations made by agency counsel, which as in the present case, are often the product of a closed and biased process.

> We previously have stated that *post hoc rationalizations by counsel for agency action are entitled to little deference. 'It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.'*

Id. at 113-114. (Emphasis added).

In conclusion, there are many reasons why this Court should not accept the invitation of GECC to simply acknowledge an opinion of the Bank Board's counsel on the issues in suit and rule for GECC. *Milhollin* is unique to the TILA context.[2] The opinion advanced by GECC is not that of the Bank Board but is a statement solicited *ex parte* by GECC from subordinate officials who were not authorized to make interpretations of the legislation and regulations at issue in this case. Moreover, and most importantly, the opinion is incorrect.

---

[2]444 U.S. at 567-568; 15 U.S.C. § 1640(f).

II.

The Issue Of Federal Law Is Important And Is One That Should Be Decided By This Court.

In its response to the Petition for Certiorari, GECC attempts to belittle the importance of the issue before this Court by categorizing it as the mere construction of a single sentence in a contract.[3] The fact that GECC loaded all of its powerful and onerous collection remedies in one sentence of its contract reflects only its skill in drafting a form contract of adhesion. The Grants served discovery on GECC to determine why it failed to comply, but the 12(b)(6) dismissed in the District Court prevented that procedure from continuing. In making its argument of unimportance, GECC downplays the clear intent of Congress in the passage of the Preemption Act which was: in order for a finance company such as GECC to obtain a higher finance charge than that allowed by state law, the borrower was to receive the consumer benefits mandated by Congress.

State laws governing the time-price differential (finance charge) that could be charged on mobile home transactions would only be preempted on the condition that consumer debtors would be guaranteed certain safeguards. See H.Conf.Rept. 96-842, 96th Cong., 2nd Sess. 79, *reprinted* in 1980 *U.S. Code Cong. & Ad.News*, 298, 309. In the case at bar, GECC could only charge unlimited finance charges if the "terms and conditions" of its credit sales contract complied with regulations promulgated by the Bank Board. Preemption Act § 501(c). While the Bank Board was given broad discretion in fashioning those consumer protection regulations, Congress mandated and obviously intended that mobile home purchasers would

---

[3]While disparaging the importance of this issue before this Court, the trade organizations representing GECC and other finance companies at the same time have been lobbying Congress to amend the Preemption Act to allow the finance companies to amend their contracts now so as to preempt state laws retroactively. A draft of the proposed amendment is known as S.L.C. Draft No. 089910.415. A hearing on this amendment was held before the Senate Subcommittee on Financial Institutions and Consumer Affairs on November 6, 1985. *The Columbus Enquirer*, Nov. 7, 1985, p. B-1.

have a contractual right to the same notice of default and 30 days in which to cure the default as are granted to conventional home purchasers in Feddie Mac and Fannie Mae uniform notes, mortgages, deeds of trust and deeds to secure debt. H. Conf. Rept., *supra*.

GECC has stated that petitioners cannot allege any misconduct on its part or damages to the class. However, this case was dismissed on a F.R.C.P. 12(b)(6) motion before petitioners had an opportunity to present evidence. The damage to the Grants is that they are paying finance charges of $17,896.50 in excess of that permitted by Georgia law while GECC has failed in preparing its documents to pay the concomitant price for preemption. Thus, the only party receiving a "windfall" is GECC.

GECC mentions on page 13 of its Brief in Opposition to the Petition for Writ of Certiorari that at the time of the Grant contract, the prime rate was "17%." The term "prime rate" is an illusive term. *American National Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. ____, 87 L.Ed.2d 437 (1985). Treasury issues maturing in 1998 were yielding 13.15%. *Wall Street Journal*, February 23, 1982, at 52, Col. 4. The average contract interest rate on conventional first mortgage loans for the purchase of single family homes during the calendar year 1982 was 14.5%. 1985 Statistical Abstract of the United States, 105th Ed., U.S. Dept. of Comm., Bureau of the Census, No. 1329. The Grants were charged a time-price differential which equates to 20.12% simple interest rate over a 15-year term. The implication GECC makes is that it gave purchasers a fair deal and that this Court should not allow state law to operate as the Preemption Act requires. This plea pales when one considers the fact that as of November 23, 1985, after 46 months, the actuarial pay off on the Grants' contract was $24,832.78 while the loan value or wholesale value is $20,395.00. *National Automobile Dealers Association Mobile Home Manufactured Housing Appraisal Guide*, Sept.-Dec. Ed., 1985. Thus, in order for the Grants to sell their trailer, they not only lose their down payment of $4,300.00 plus their paid-in equity, but also

would have to pay someone to assume payments on a depreciating trailer.[4]

However, the issue before this Court should not be the reasonableness of a time-price differential computed at an annual percentage rate of 20.12% over a 15-year period or the plight of the Grants and those similarly situated. The point is GECC did not, on February 23, 1982, pay the price for preemption and thus, cannot now claim preemption from state law, regardless of the reasonableness or unreasonableness of a 15-year rate of 20.12% which for the Grants amounts to a finance charge of $57,546.00 on a trailer with an initial unpaid balance of $26,433.00.

III.

The Claims Of Petitioners Have Not Been Affected By Legislation Enacted In Georgia Subsequent To The Filing Of This Action.

Contrary to the assertions of respondent, this action is not a "usury" claim. The transaction is not a "loan" and there has been no charging of "interest." Petitioners made installment purchases and were charged a time-price differential regulated by Georgia law. *Sumner v. Adel Banking Co.*, 244 Ga. 73, 259 SE2d 32 (1979); *E. Tris Napier Co. v. Trawick*, 164 Ga. 781, 139 SE 552 (1927); *Rigdon v. Walker Sales & Service, Inc.*, 161 Ga. App. 459, 288 SE2d 711 (1982); and *Richardson v. C.I.T.*, 60

---

[4]In testimony before Congress in February 1980, the finance companies asked for preemption on the basis that the consumer protections to be required in the Preemption Act would make mobile home financing similar to the financing of conventional homes. February 21, 1980 testimony of the Coordinating Council on Mobile Home Financing before the House Banking, Finance and Urban Affairs Committee at pp. 24-25. Conventional home borrowers have collateral which retains value or appreciates. Throughout the county, high interest conventional home loans have been refinanced at significant savings to borrowers. In contrast, mobile home borrowers such as petitioners are slaves to contracts with the highest long-term interest rates in the country, which contracts are illegal.

Ga. App. 780, 5 SE2d 250 (1939). Thus, the Georgia cases of *Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 SE2d 729 (1985) and *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 SE2d 906 (1984) and their progeny which deal with usury and which follow this Court's decision of *Ewell v. Daggs*, 108 U.S. 143 (1883) are not applicable.[5]

While the Georgia General Assembly did opt-out of the Preemption Act by the enactment of new provisions known as OCGA § 7-4-3, Ga. Laws 1983, p. 1146 at 1149, the Georgia General Assembly indicated that the law should only be given prospective and not retrospective application. OCGA § 7-4-5(b), Ga. Laws 1983, p. 1146 and 1151, provides in part:

> Such liability may be asserted in an individual action only and may not be the subject of a class action; provided, however, this provision shall not apply to any class action pending prior to March 31, 1983.

Obviously, the Georgia General Assembly was aware of these pending class actions at that time and intended that the statute should only be given prospective application. Moreover, in lifting the restriction on the amount of finance charge that could be exacted by a finance company, the Georgia General Assembly stated that "the contract provisions required by subsection (c) of [the Preemption Act]" were to be included in financing documents executed after March 31, 1983. OCGA § 7-4-3(b)(1). Therefore, Georgia has specifically declared that the 30 day notice of right to cure must be included in the contract documents.

In 1985, the Georgia Motor Vehicle Sales Finance Act (GMVSFA) was again specifically amended by providing that a buyer and a seller in a regulated transaction could establish any

---

[5]These Georgia cases also specifically turn on the fact that Georgia distinguishes between actions which were filed prior to a change in the law and those which were not. Furthermore, the rationale of *Ewell v. Daggs*, *supra*, may no longer be applicable. *See United States Trust Company of New York v. State of New Jersey*, 431 U.S. 1 (1977).

finance charge agreed upon in writing by the parties where the amount financed was more than $5,000.00. OCGA § 10-1-33(b), H.B. 452, Ga. Laws 1985, p. 698 at 699. The Georgia legislature was specifically aware at that particular time of the pendency of this action and other related class actions and provided therein, OCGA § 10-1-36.1(b), Ga. Laws 1985, p. 698 at 699:

> Nothing contained in this Code Section shall apply to class actions involving mobile homes or manufactured homes pending in any court of this state, including United States Courts, on February 22, 1985, as to the parties to and subject matter then before such court.

The legislative history in Georgia, scant as it may be, supports the contention that the Georgia General Assembly knew specifically of these class actions and had no intention of passing any statute that would be given any retroactive effect.[6]

Georgia could not have done otherwise. Looking at the plain wording of the contract itself and the GMVSFA as it existed at the time of the contract, it is obvious that the Georgia statute created private rights of a contractual nature. There is nothing that the Georgia General Assembly could do to impair these obligations of contracts. Art. 1, Sec. 10, Clause 1, United States Constitution. The GMVSFA is a comprehensive statute governing the time-price differential of "motor vehicles," and a trailer is classified as such in Georgia. Statutes governing the interpretation and enforcement of contracts are regarded as forming part of the obligation of contracts made under their aegis. *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 17, n. 14, p. 19, n. 17 (1977).

Also, if the Georgia amendments were deemed retroactive, serious due process issues would arise. *Louisville Joint Stock*

---

[6]Interestingly enough, GECC's law firm was present at the time of this amendment and, in the words of one Georgia State Senator, was "walking the halls." See Appendix C of this Reply at p. 17a. Furthermore, the sponsor of said Bill in the Georgia Senate stated that it would not affect pending actions. See Appendix C at p. 13a.

Land Bank v. Radford, 295 U.S. 555 (1935). This Court has always attempted to construe a statute in such a manner that constitutional questions may be avoided. *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

CONCLUSION

For the reasons set forth in the Petition and this Reply, writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

THOMAS W. TUCKER
Counsel of Record
DYE, MILLER, TUCKER & EVERITT
Post Office Box 2426
Augusta, Georgia 30903
(404) 722-0771

JOHN BELL TOWILL
DAVID E. HUDSON
HULL, TOWILL, NORMAN & BARRETT
Post Office Box 1564 (13)
Augusta, Georgia 30913
(404) 722-4481

JOHN B. LONG
NIXON, YOW, WALLER & CAPERS
1500 Georgia Railroad Bank Building
Augusta, Georgia 30901
(404) 722-7541

Attorneys for Petitioners

APPENDIX

APPENDIX A

WITKOWSKI, WEINER, McCAFFREY and BRODSKY, P.C.

October 7, 1982

Thomas P. Vartanian, Esq.
General Counsel
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Manufactured Housing Consumer Protection Provisions — Repossession Notice (§ 590.4(h))

Dear Mr. Vartanian:

We are writing on behalf of the General Electric Credit Corporation ("GECC") to request that the Federal Home Loan Bank Board (the "FHLBB" or "Bank Board") address itself to an issue which has arisen in litigation and which is described in the paragraphs below. We further request that the Bank Board publish its response in a formal interpretation pursuant to 12 C.F.R. § 590.5 under the authority vested in it by § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA" or "the Act").

Statement of Facts — The litigation arose in the state of Arkansas out of the following facts and circumstances. The defendants in the case, on or about May 14, 1981, purchased a mobile home under a retail installment sales contract that was assigned to the plaintiff, our client. The credit sale was secured by the mobile home itself, and the rate upon which the finance charge was calculated under the contract was 17.8 percent, a rate in excess of that permitted under Arkansas state law. However, the plaintiff had carefully structured the transaction to comply with the Bank Board's consumer protection regulations regarding manufactured home loans and credit sales. (12 C.F.R. § 590.4). Under DIDMCA such compliance is a prere-

quisite for the exemption of these credit transactions from state usury laws (§ 501(a)).

The defendants defaulted in payment under the contract, leaving a substantial unpaid balance outstanding. Upon default, plaintiff gave written notice 30 days prior to acceleration of the debt and repossession. This notice was given on the form and in the manner prescribed by 12 C.F.R. § 590.4(h)(2). Reference to this notice requirement was initially made in the contract in the following manner:

> In the event of Buyer's default in payment when due, Seller may declare immediately due and payable any and all installments due or to become due hereunder, less the unearned portion of the *FINANCE CHARGE* calculated by the Actuarial Method, provided that Buyer shall be given notice of right to cure default before Seller is permitted to exercise that right.

At the ensuing possessory hearing, defendant contended that the contract was usurious under Arkansas law and, therefore, unenforceable. GECC contended that the requirements of the federal preemption of state usury laws for mobile home credit sales under § 501 of DIDMCA had been met and, therefore, the contract was enforceable.

Lest the Bank Board hesitate to issue an interpretation that may influence the course of litigation on the grounds that material facts are in dispute, it should be understood that the material facts of this case were stipulated to by the parties at the hearing. There is no dispute that (1) the contract did not expressly disclose all of the facets of the borrower's right to a 30-day notice, and (2) that the 30-day notice was actually given prior to repossession. The only issue to be decided was whether GECC was required to expressly include as a term of the contract the right of the borrower to a 30-day notice in order to take advantage of the federal rate preemption under DIDMCA.

Despite the fact that the 30-day notice had been given as prescribed, the presiding judge made a preliminary finding

that a loan or mobile home credit sale does not qualify for federal preemption without an explicit contractual disclosure to the consumer of a 30-day notice of his or her right to cure default. Because the contract in this case did not explicitly detail all of the consumer's rights upon default, including the 30 day right to cure, the judge ruled that this credit sale did not qualify for the preemption of the state usury ceiling under § 501 of DIDMCA and 12 C.F.R. § 590.4(h).

Issue — Our question to the Bank Board flows from this ruling. Must a 30-day notice of default and right to cure default be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption pursuant to § 501 of DIDMCA?

ARGUMENT

Introduction — It is our belief that this question should be answered in the negative. We respectfully submit that there is nothing in the Conference Report to § 501 of the Act, the Act itself, the Bank Board's regulations or subsequent interpretations thereof that would require that "notice" of the 30-day cure requirement be contained in the credit contract. We assert, rather, that the 30-day notice provision applies only when default occurs and that any interpretation to the contrary — in the absence of an express legislative or regulatory directive requiring its inclusion — jeopardizes the enforceability of thousands of existing contracts and undermines the safety and soundness of the manufactured housing finance industry.

We also submit that the consumer in this case (as well as any similarly situated individual) neither suffered any harm nor was deprived of any benefit by not having the 30-day notice provision reflected in the credit contract. The consumer did in fact receive a notice of the right to cure. The notice was given in a timely manner on the exact form prescribed by § 590.4(h)(2). All other consumer protections required by the Bank Board were provided. Under these circumstances, the consumer would have had no greater rights or benefits had he received notice of the 30-day right to cure in the credit contract.

Text of § 501 — The text of § 501 states that the exemption from state usury laws for credit transactions secured by a first lien on a manufactured home will not apply "unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board" (§ 501(4)(c)). That section further states that the Bank Board's regulations must include three enumerated provisions, among them, a "30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)." (Emphasis added.)

There is nothing in this statutory language which implies an affirmative requirement to have the 30-day notice reflected in the credit contract. On the contrary, the notice requirement exception applicable to abandonment and other extreme circumstances presumes that the notice is to be given exclusively at the time of default and not at the beginning of the legal relationship between the parties[1]. If Congress had intended

---

[1]The result enunciated in the judge's preliminary conclusion may have been premised in part on the notion that a "loan" is either usurious or in compliance at the time of consummation. However, the concept of "loan" involves the entire transaction, from application through collection, and is not merely limited to the execution of a contract. A loan can be usurious, even though the "contract" is entirely legal. For example, assume that a precomputed interest loan is consummated at the maximum rate allowed under state law. Upon prepayment in full before maturity, state law requires that a rebate of any unearned finance charges calculated under the actuarial method is required. If unearned finance charges were rebated under the "Rule of 78's" method rather than under the actuarial method, usurious interest would be collected. Such a transaction would be usurious (1) even if the contract was silent as to the rebate method, and (2) even if the contract called for the use of an actuarial rebate. On the other hand, if an actuarial rebate is actually performed, the transaction would not be usurious, even though the contract was silent as to the rebate method. Clearly, subsequent events affect usury determinations, the terms — or lack of terms — in the contract notwithstanding.

In the contested transactions, the notice required by § 590.4(h) was provided in connection with the "loan," even though the "contract" did not expressly disclose the 30-day period. Clearly, the "loan" did "contain" the required consumer safeguards. (*See* 12 C.F.R. § 590.3(a)(2) (iii).

that notice of the 30-day right was to be given in the credit contract as well as at the time of default, it would be senseless to provide an exception for "abandonment" or "extreme circumstances," because such events could not be foreseen at the time of the signing of the contract.

The statutory language clearly indicates that before a creditor's duty to give the notice arises, default must occur. No duty would arise unless and until default occurred. However, even this duty would be excused if abandonment or other extreme circumstances occurred. Because abandonment and extreme circumstances cannot be predicted at consummation, the disclosure can only take place at a later period in time.

Conference Report — In the Manufactured Home Financing section of the Joint Explanatory Statement of the Committee of Conference (H.R. Rep. No. 96-842, at 79 (1980)), the conferees made no mention whatsoever of the 30-day notice requirement. The Conference Report accompanying the Act provides that the consumer safeguards should not preempt similar state laws that are more protective of the consumer. With regard to the contested case, the state of Arkansas has no statutory requirement directing a creditor to give any type of notice upon default on a loan and thus federal law exclusively applies.

Bank Board Regulations — The FHLBB's consumer protection regulations for federally related loans, mortgages, credit sales and advances secured by first liens on residential manufactured homes are set forth in 12 C.F.R. § 590.4. The 30-day notice provision contained therein expands considerably the requirement stated in § 501 of the Act. In addition to a mere notice prior to commencement of repossession, the regulation prescribes a standard form for the notice which includes, most notably, a provision giving the consumer a right to cure the default within 30 days (12 C.F.R. § 590.4(h)).

The regulation states that such notice must be given prior to an exercise of the creditor's rights upon the consumer's default. There is nothing in § 590.4(h) (or the regulatory preambles to the Bank Board's rule and its subsequent amendments) that

would lead one to believe that disclosure of the notice requirement in the credit contract is either presumed, anticipated, intended, or required. We note, moreover, that the statutory exemption from the notice requirement for "abandonment" or "extreme circumstances" is reflected in the regulation. The inferences that flow from the statutory exception apply equally here. The fact that the entire provision is prefaced with the exception — "Except in the case of abandonment or other extreme circumstances . . ." — indicates that no affirmative notice or disclosure duties are placed on the creditor if the exception applies.

Section 590.4(h) also provides an additional exception that cannot be foreseen at the time of the signing of the credit contract. It provides: "The debtor is not entitled to notice of default more than twice in any one-year period." As in the case of abandonment or other extreme circumstances, it appears that because the circumstance of three defaults in a one-year period is not forseeable [sic], any contractual reference to the debtor's right to notice could not have been intended by the Bank Board.

If the specific requirement of the 30-day notice as set forth in § 590.4(h) is determined to be required in the credit contract, compliance with such an interpretation would mandate that a clause similar to the following be part of every manufactured housing credit contract that relies on the § 501 preemption. Such a clause would be so fraught with conditions and exceptions in order to adequately state the scope of the right as to make it vague and confusing to the consumer. At a minimum, it would have to include the following information:

> If the Buyer defaults in any of the terms of this contract giving rise to acceleration and repossession, the Buyer shall be given 30-days notice of the right to cure the default before Seller is permitted to exercise his right to accelerate this obligation and foreclose on the secured property; provided, however, that in the case of abandonment of the manufactured home or other extreme circum-

> stance, or in the event that the Buyer has already defaulted on two prior occasions within a one year period prior to the instant default and in connection with each such prior default Sellor [sic] has given the Buyer a notice of the right to cure the default in a manner that is in compliance with this provision, no notice shall be given.

Despite this law firm's substantial involvement in the area of manufactured housing finance, we have never encountered such an interpretation of § 590.4(h) nor a credit contract that would be in compliance with such a requirement.

An interpretation that would require a contractual clause that specifically reflects the provisions of § 590.4(h) to be included in the contract would result in an *ex post facto* requirement that would instantly expose the manufactured housing finance industry to overwhelming liability. Moreover, this burden to the industry would not be counter-balanced by a corresponding benefit to consumers. As noted above, the inclusion of a contractual clause accurately reflecting the regulatory provisions and exceptions would be so convoluted and vague that it would have little meaning to consumers[2]. Nor would the creditor be able to simplify the clause by leaving out the circumstances under which the exceptions to the notice requirement apply, because such omissions either would make the contract vague or would subject creditors to contractual requirements broader than those set out in the regulation. If a creditor were

---

[2]To the extent this notice is intended to "disclose" to the consumer his rights upon default, the amount of detailed and conditioned information required to accurately inform the consumer of his rights would inject precisely the type of "informational overload" into the contract that Congress attempted to eliminate in Title VI of DIDMCA (the "Truth in Lending Simplification and Reform Act"). Moreover, an interpretation requiring such an explicit statement of the right to be included as an express term of the contract — when the disclosure provided following default clearly accomplishes all statutory objectives — erects a hypertechnical barrier to creditor compliance. Such complexity is all too reminiscent of the compliance burdens which the Truth in Lending Act and Regulation Z placed on creditors before Congress wisely enacted simplifying amendments to facilitate compliance, limit cereditor [sic] liability and prevent information overload.

to merely state that a 30-day notice is required, the creditor would be contractually bound to give such notice even under circumstances in which the Bank Board's regulations would otherwise permit the creditor to exercise rights upon default without giving notice.

We also note that when the Bank Board intended creditors to include other terms and conditions in the contract, it expressly set forth the requirements in its regulations. For example, 12 C.F.R. § 590.4(d), which requires that the debtor be permitted to prepay the loan at any time without penalty, expressly states that "[t]he right to prepay shall be disclosed in the loan contract . . . ." Subsection (e), regarding balloon payments, permits balloon payments if, *inter alia*, such payments are agreed to in writing and "the agreement sets out the amounts and due dates of each scheduled installment." The late charge provision, subsection (f), provides that "[n]o late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and the debtor." Finally, subsection (g), regarding deferral fees, states that "agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties . . ." and then sets forth the necessary elements of that agreement.

In contrast, subsection (h), which requires the 30-day notice before repossession, foreclosure or acceleration, is noticeably silent with regard to any requirement that the right be specified in the contract. This subsection merely requires that the 30-day notice be provided before repossession, forclosure [sic] or acceleration. We believe that the Bank Board's omission of any explicit requirement that the 30-day notice be a term of the contract, when it had explicitly required other consumer protections to be written into the contract (and in fact did so in the four preceding subsections of the regulation), clearly demonstrates that the Bank Board did not intend to impose a requirement that the borrower's right to a 30-day notice be a contractual term.

We request that the Bank Board clarify the ambiguity created by the Arkansas court and reaffirm its intent that such a contractual term is not required.

Conclusion — Based upon the foregoing analysis of all relevant sources of interpretation with regard to the 30-day notice requirement, we believe that:

(1) the language of the regulation and the statute do not indicate that a 30-day notice of default and right to cure default must be a term of a consumer's credit contract for the purchase of a manufactured home in order for the transaction to qualify for federal preemption;

(2) no greater rights or benefits would inure to the benefit to [sic] consumers if such a provision were required in the contract;

(3) relying on the absence of an express requirement that such a notice be contained in the contract, the manufactured housing credit industry has consummated thousands of contracts relying upon the § 501 preemption without such a notice; and

(4) an interpretation to the effect that the statute or regulation implicitly requires such a provision in manufactured housing credit contracts would jeopardize the legality and enforceability of thousands of existing contracts, and would impose great financial liability upon the manufactured housing credit industry.

Accordingly, we request that the Bank Board issue an interpretation holding that such a contractual term is not required to qualify for the preemption pursuant to § 501 of the Act, so long as an appropriate notice (if required) is issued by the creditor to the Buyer at least 30-days prior to repossession, foreclosure or acceleration upon default and all other consumer safeguards prescribed by the regulation are provided.

We trust that the above material fully presents the issue faced by our client. If we can be of any further assistance in this regard, please do not hesitate to call.

Sincerely,

/s/ D. Edwin Schmelzer

D. Edwin Schmelzer

DES/am/4033B/805
cc: Windy Samuel, Esq.
HAND DELIVERED

APPENDIX B

FEDERAL HOME LOAN BANK BOARD

December 20, 1983

John B. Long, Esq.
Nixon, Yow, Waller & Capers
1500 Georgia Railroad Bank Building
Augusta, GA 30910-2599

Dear Mr. Long:

This is response to your letter concerning the status of a letter written by Thomas P. Vartanian, former General Counsel of the Federal Home Loan Bank Board, interpreting 12 C.F.R. § 590.4(h).

The letter in question, dated October 28, 1982, which contained an interpretation of § 590.4(h) (12 C.F.R. § 590.4(h) (1982)), was an opinion of the General Counsel issued pursuant to his authority as the Chief Legal Officer of the Board. See 12 C.F.R. 500.17. The Board has not issued a specific delegation of authority to the General Counsel to issue interpretations with regard to § 501(f) of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221.

Please let me know if I may be of further assistance.

Sincerely,

/s/ Wendy B. Samuel

WENDY B. SAMUEL
Deputy Director
Policy & Projects Division

APPENDIX C

SENATE DEBATE AND VOTE
ON HOUSE BILL 452
FEBRUARY 28, 1985

(SENATE AIDE READING CAPTION OF BILL):

HOUSE BILL No. 452 by Representatives Coleman of the 118th, Horne of the 103rd and Jackson of the 9th. "A bill to be entitled an act to amend Article 2 of Chapter 1 of Title 10 of the Official Code of Georgia, Annotated, known as the Motor Vehicle Sales Finance Act, so as to change the delinquency charge; to remove the finance charge limitations on certain loans; to provide that a claim of violation on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action" and for other purposes.

(SENATOR FROM THE 12th):
Mr. President.

(SENATE PRESIDENT):
Recognize the Senator from the 12th.

(SENATOR FROM THE 12th):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 12th):
Is this a request to agree to a house amendment?

(SENATE PRESIDENT):
It is.

(SENATOR FROM THE 12th):
Is somebody going to explain it to us?

(SENATE PRESIDENT):
They are - before I put it to a vote. Yes, recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Mr. President, House Bill 452 was a bill that raised the - set a limit on what you could finance, negotiate interest on the finance on the selling of automobiles, $5,000. Anything above $5,000 on automobiles, that the automobile dealers could finance the - uh - negotiate the interest on the balance. There was an amendment put on to - on a floor substitute or committee substitute put on that dealt with the mobile home area. There was some concern about that . . some suits that were pending. And we have tried for the last, I say, we, the House and Senate and the lawyers that's all involved, has tried to work out some language. One side tells me that they have reached an agreement; the other side says that they need a change in other words. The authors of the Bill and myself, the sponsor of the Bill in the Senate, want this substitute just like it is. We feel like, and we've got counsel from the Legislative Counsel, that says that the Bill does what it's supposed to do. There is a suit pending, I believe it's in Richmond County, Augusta, somewhere of that nature, there's a suit pending and this Bill with the Amendment that the House put on it could not possibly affect that suit. It would affect suits from thereafter. Now, I urge that you adopt the, or agree to the House Amendment to the Senate Substitute to House Bill 452.

(SENATE PRESIDENT):

The motion is . . . Recognize Senator from the 22nd.

(SENATOR FROM THE 22nd):

Thank you, Mr. President. Ladies and Gentlemen of the Senate. Everyone who's been interested in this Bill has been in agreement that it should not apply to pending litigation. Where the difference arises is simply in this. The House Amendment that we are now asked to vote on says on the first line "nothing contained in this Code Section shall apply," etc., etc. There is a difference of opinion between the lawyers and the parties that are interested in this as to whether or not that language would indeed exempt pending litigation. There is a serious doubt in my mind. It is entirely possible that the language would exempt the pending litigation. However, there is also the very

real possibility that it would not. Therefore, what we ask you to do is to appoint a conference committee and here's the only change that we would urge that the conference committee make. "Nothing contained in House Bill 452," which is this Bill, shall apply to the pending litigation. That's basically what it would say. Then everyone would be certain within any reasonable area, that it doesn't apply to pending litigation but we simply need the conference committee because we have no other procedure available to us to change the House Amendment. But in the conference committee, I think we can assure you that the only change that will be urged by the Senate is to just simply put in "House Bill 452" so there will be absolutely no doubt that this Bill does not apply to pending litigation. It's a very fair and reasonable thing for everybody to do.

(SENATOR FROM THE 22nd):
I yield, sir.

(SENATE PRESIDENT):
Recognize Senator from the 33rd.

(SENATOR FROM THE 33rd):
Mr. President, does the Senator yield?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 33rd):
Senator, you do agree that this Bill should not be killed.

(SENATOR FROM THE 22nd):
Oh, absolutely. We have no desire to kill the Bill. It should pass. It is a question of words and I agree with that but words could be critical and I think they are critical in this instance.

(SENATOR FROM THE 33rd):
All right, and Senator, you do agree that, of course, a conference committee could be appointed and the Bill could still pass in the next day or two.

(SENATOR FROM THE 22nd):

Well, I would certainly hope that. I know that it could happen and I would hope that is what would happen.

(SENATE PRESIDENT):
Recognize Senator from the 15th.

(SENATOR FROM THE 15th):
Senator.

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 15th):
Isn't it true that this Amendment that was placed on in the House reads just like this. "Nothing contained in this Code Section shall apply to class actions involving mobile homes or manufactured homes pending in any courts of this state, including any United States courts, on February 22nd, 1985, as to the parties and to the subject matter then before such court." Is that not the way that this Amendment that I'm trying to get you to agree to, reads right now?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 15th):
And what you're trying to say is that you want to take out "in this Code Section" and insert "nothing in House Bill 452." That's just a play of words that's going on.

(SENATOR FROM THE 22nd):
Well, it's not really a play on words, but yes sir, you are correct in saying that those are only the words that we propose to, that we think need to be changed in order to carry out the intent that everybody said they wanted to carry out.

(SENATOR FROM THE 15th):
Is it not further true, Senator, that we could get a conference committee appointed, and then that conference committee could never meet, and this Bill could possibly be killed by the fact that the conference committee never could agree on words? Is that not true?

(SENATOR FROM THE 22nd):
Senator, that is certainly possible. I do not think that's going to happen and I believe that with your guidance and direction and hopefully the guidance and direction of the other conferees that we will be back within a day with a Bill that we can pass.

(SENATE PRESIDENT):
Recognize Senator from the 19th and then will get to the 23rd.

(SENATOR FROM THE 19th):
Senator yield?

(SENATOR PRESIDENT):
Senator yield?

(SENATOR FROM THE 22nd):
Yes, sir.

(SENATOR FROM THE 19th):
Senator, will that be a recommendation to the conference committee to keep what the Senator from the 15th said in the Bill?

(SENATOR FROM THE 22nd):
Well, of course, that is, that is the House's position at the present time. The language that is being offered by the Senator from the 15th. If we accept the House version, that is the language we would accept, I mean that would be in the Bill, and that language, we believe, or we are really concerned, would not exempt pending litigation. Any everyone, the mobile home dealers, everyone who has been involved agree, as far as I can determine, that they want to exempt pending litigation and it's just simply a question of what language must we use to accomplish what everyone says they want to do.

(SENATOR FROM THE 19th):
Thank you.

(SENATOR FROM THE 22nd):
Thank you, Mr. President. I urge that we reject the House version and have a conference committee. Thank you.

(SENATE PRESIDENT):

Recognize Senator from the 23rd.

(SENATOR FROM THE 23rd):

Mr. President, Ladies and Gentlemen of the Senate. I just wanted to add a couple of things to what Senator Allgood said. Of course, this does affect lawyers in Augusta, Georgia who came up here and pointed out this problem to us. But it also affects about 6,000 people who have lawsuits pending in Federal Court in Augusta. These are people that are poor people who own mobile homes that don't have King and Spalding up here walking the halls representing them. These people have their suits filed. They do feel, the lawyers from Augusta do feel that these few, this little change is critical to keeping these courts, these cases alive and I don't think it's too much to ask for a conference committee to go back and just try to change this one little think on these 6,000 suits. I think they are very important to these 6,000 people. I yield.

(SENATE PRESIDENT):

Recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Senator, would you not agree that it's just good old common walking around Georgia language that "nothing contained in this Code Section shall apply to class action suits involving mobile homes or manufactured homes:". Isn't that plain, just good old Georgia language, that nothing, nothing pending would apply to it?

(SENATOR FROM THE 23rd):

Senator, that's good old, old Georgia common sense language, but in Federal Courts, they don't listen to that good old Georgia common sense language. They want it the way it's supposed to be to keep these cases alive. If there are no further questions, I yield.

(SENATE PRESIDENT):

Recognize Senator from the 15th.

(SENATOR FROM THE 15th):

Mr. President, I move the previous question on House Bill 452 and urge that we agree to the . . .

(SENATE PRESIDENT):
Recognize Senator from the 33rd.

(SENATOR FROM THE 33rd):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 33rd):
Mr. President, is it not true that if the motion to agree fails that it would be in order for a motion to disagree and that is the only way that a conference committee could be appointed.

(SENATE PRESIDENT):
The Senator is correct except then it would have to go back to the House and they would have to insist on their Amendment and then come back over here and then we'd have a conference committee. Everyone understand that? The motion of the Senator from the 15th is for the Senate agree to the House Amendment to the Senate substitute to House Bill 452. All those who favor of that motion, rise, stand and be counted. You're right. I'm going to put it on the machine.

(SENATOR FROM THE 22nd):
Parliamentary inquiry.

(SENATE PRESIDENT):
State your point.

(SENATOR FROM THE 22nd):
A vote of no or defeat of this motion is necessary in order for us to even have a chance to have a conference committee. Is that not correct?

(SENATE PRESIDENT):
The motion, if it failed, then I could take the motion to disagree which would be the first step toward getting a conference committee appointed. The motion of the Senator from

the 15th is for the Senate to agree to the House Amendment to the Senate substitute House Bill 452. All those who favor that motion will vote.

(SENATE PRESIDENT):

On the motion, the ayes are 35 and the nays are 16 and the Senate has agreed to the House amendment to Senate substitute House Bill 452.

I certify that the foregoing is a correct transcript of the audio tape of the Senate debate and vote on House Bill 452, February 28, 1985.

/s/ _____
TOM WASSELL
Senate Public Information
Officer, Georgia State Senate